APR 12 1965

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR JOHN HUGUEZ, Appellant,	)	
vs.	)	NO. 21518
UNITED STATES OF AMERICA, Appellee.	)	

PETITION FOR REHEARING

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TO: THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE HONORABLE CIRCUIT JUDGES BARNES AND ELY AND UNITED STATES DISTRICT JUDGE ANDREW HAUK:

Comes now the UNITED STATES OF AMERICA, appellee in the above-entitled cause, and, pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, petitions the panel which rendered the decision in the above-entitled cause, which said opinion was filed September 30, 1968, for a rehearing on the following grounds:

1. The decision should specity whether a new trial be ordered by the trial Court. The opinion herein emphasizes a lack of evidence concerning the knowledge possessed by Dr. Salerno and the officers in regard to the suspect. Such evidence was not produced because it was not considered to be

essential under the legal standards then in effect. As the opinion of Judge Hauk notes, the test for body cavity border searches changed between the time of trial and the date of the Huguez opinion herein. It was assumed at the time of trial that "mere suspicion" was the test. The trial Judge applied a test of "some suspicion." [R.T. 129-130][1] The Government produced more than the required evidence to satisfy this "suspicion" standard. However, the standard changed to "plain suggestion," a stricter standard, after the trial herein.

Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966)

In view of the huge quantity of narcotics involved herein, it is respectfully suggested that a change in legal standards should not prevent a retrial where the evidence may show that the stricter standard was satisfied. A similar procedure was followed in Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960), in which case there was a second hearing upon the Fourth Amendment question after reversal upon appeal in Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959).

In Polk v. United States, 291 F.2d 230, 232 (9th Cir. 1961), this Court found a "paucity" in the record

[1] "R.T." refers to Reporter's Transcript of Proceedings.

regarding a Fourth Amendment question and remanded the case for further proceedings, resulting in the affirmance of the judgment of conviction, Polk v. United States, 314 F.2d 837 (9th Cir. 1963). It would appear that this procedure is preferable to taking the assumption that the record is unfavorable to the prevailing party merely because it is silent, where the silence upon the matter may be attributed to conclusions drawn from a legal analysis of the case law then in existence.

2. It is respectfully submitted that the decision herein is inconsistent with the decision of this Court in Rivas, supra, which provides the clearest previous Ninth Circuit analysis of the term, "plain suggestion." The opinions herein tend to cause confusion and uncertainty in the law.

It also is respectfully suggested that portions of the opinions herein are unduly critical of Dr. Salerno and the Customs officers. It is reasonable to assume that Dr. Salerno would be required to follow any orders of the Customs agents, assuming that they are lawful (an involved legal question at the time), as any person within three miles may be required to assist an authorized Customs agent in a search or seizure and is guilty of a criminal offense if he refuses to do so. 19 U.S.C.A. 507.

In view of the fact that the entire procedure was carried out "in a medically-approved manner" [R.T. 34]; that

the rectal examination which located the contraband narcotics was not painful [R.T. 38]; that the removal of the contraband would not have been more uncomfortable than a hard bowel movement, in absence of resistance [R.T. 39]; that if the officers believed that the search was lawful, they would naturally follow the principle that necessary force may be employed to overcome resistance to a lawful search; and the fact that there is little reason to believe that the removal was more violent than the forcible removal of narcotics from rectums in Blackford v. United States, 247 F.2d 745, 747 (9th Cir. 1957), and Denton v. United States, 310 F.2d 129, 131 (9th Cir. 1962), it is suggested that it is questionable whether it is completely fair to Dr. Salerno and the agents to describe the procedure as brutal and frightening and to suggest that the medical surroundings were indecent. In Denton, supra, a needle injection was forcibly given to the suspect as he physically resisted, "suddenly throwing up his hands" (at p. 131). (Appellee recognizes that the language of the opinions herein is not ground for rehearing).

For the two reasons previously stated, appellee respectfully submits that a rehearing of this cause should be ordered.

Respectfully submitted,

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